SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 744

HARRISBURG DAILY MARKET, INC., *Petitioner*,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, and UNITED STATES OF AMERICA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Harrisburg Daily Market, Inc., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review a final judgment of that Court affirming a decision and order of the Secretary of Agriculture.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported but a copy thereof is attached to this petition as Appendix A hereto, *infra*, pages 24 to 25. The date and time of its entry was October 4, 1962.

The Decision and Order of the Secretary of Agriculture is found at pp. 243 to 266 of the Joint Appendix in the United States Court of Appeals for the District of Columbia Circuit, and also filed here.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to U.S.C., Title 28, Section 1254(1).

Petitioner, pursuant to application dated December 17, 1962, to the Court of Appeals for the District of Columbia Circuit, was granted an extension of time within which to file Petition herewith, until January 18, 1963.

QUESTIONS PRESENTED

Four important federal questions presented herein are:

1. Whether the shipment in interstate commerce of misbranded potatoes, is violative of Section 2(5) of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., in the absence of willfulness on the part of the shipper to violate the Act?

2. Whether disciplinary proceedings by the Secretary of Agriculture against only one of two participating licensee shippers of certain lots of misbranded potatoes in interstate commerce, constitute an arbitrary

and capricious application of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq.?

3. Whether, under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), in the absence of willfulness, a participating shipper of misbranded potatoes in interstate commerce, demonstrates or achieves compliance with all lawful requirements, by correcting, or causing to be corrected, the grade markings of such potatoes within due time after the shipper has knowledge of the misbrandings?

4. Whether the Secretary of Agriculture, in ordering the suspension of the license of Harrisburg Daily Market, Inc., for ten (10) days, complied with all procedural requirements?

THE STATUTES INVOLVED

1. The statute involved in the determination of the first question is the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq.

2. The statutes involved in the determination of Questions 2, 3 and 4, are: the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., and the Administrative Procedure Act, 5 U.S.C. 1008(b).

STATEMENT OF THE CASE

The first question sought to be determined is whether or not the element of willfulness is a necessary and integral part of Section 2(5) of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq. Section 2(5) of this statute reads as follows:

> Sec. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> (5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce.

The Petitioner, Harrisburg Daily Market, Inc., a Pennsylvania corporation, is licensed as a commission merchant, dealer, and broker in perishable agricultural commodities. This case is limited to potatoes, and the Decision and Order of the Secretary of Agriculture, herein, is based on lots of this commodity shipped, or caused to be shipped, by the Petitioner in interstate commerce, and determined by the U. S. Department of Agriculture, at wholesale destination points, not to conform to the requirements of U. S. No. 1 grade potatoes.

The said seven (7) lots of potatoes, excluding the shipments to Berry's Wholesale Fruits & Produce, Washington, D. C., on October 15, 1959, and to Morris Cohen, Cleveland, Ohio, on February 13, 1960 (further reference to which will be made hereinafter), were shipped on various dates in sequence as set forth in J.A. 241 (references to J.A. refer to Joint Appendix filed in the Court of Appeals for the District of Columbia Circuit, below, and also now filed here), and covered a period of sixteen (16) months, during which time Harrisburg Daily Market, Inc., shipped some 3,200 lots of potatoes, the gradings of which were not challenged by the U. S. Department of Agriculture.

In initiating disciplinary action for the alleged misbranding of potatoes, under Section 2(5) of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., the U. S. Department of Agriculture must conform to the provisions of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), which reads as follows:

> . . . Except in cases of willfulness . . . no . . . suspension . . . of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts and conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements . . .

Thus, an order of the Secretary of Agriculture for license suspension, to be well-founded, must be based on an established misbranding under Section 2(5) of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., and a showing of willfulness as an integral part of the misbranding, unless, under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), compliance with the notice requirements of this Section of the Act, are observed.

The U. S. Department of Agriculture failed to comply with the notice requirements of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b) in the instance of the *Goodman* and *Heaton & Son* shipments (J.A. 241, 262), and thus, the element of willfulness had to be established in order to include these two shipments as a basis for supporting the Order of the Secretary of Agriculture for license suspension.

In the *Goodman* transaction, Harrisburg Daily Market, Inc., had contracted for two loads of potatoes, for consignment to a customer in Ohio, from a licensed supplier, Trio Farms, Bethlehem, Pennsylvania. When the first load arrived at Petitioner's place of business, Harrisburg Daily Market, Inc., was of the opinion that the potatoes in this lot had defects in excess of allowance tolerances for the grade designation "U. S. No. 1." Petitioner immediately notified Trio Farms of this fact, and refused to accept the second load, which had not as yet arrived at Harrisburg, Pennsylvania. Trio Farms asked Harrisburg Daily Market, Inc. to "give them to somebody to sell on consignment". Petitioner thereupon called the Goodman Company in Baltimore, Maryland, informing Mr. Goodman that Petitioner had a load of potatoes in transit that in its opinion, would not grade, and asked Mr. Goodman to handle the load for the grower, or for Petitioner, but before offering them, to obliterate the grade markings "U. S. No. 1", in the event that the potatoes did not so grade. This, Mr. Goodman did, in the presence of a federal inspector, when it was determined that the potatoes were out of grade.

In the *Heaton & Son* transaction, Harrisburg Daily Market, Inc., was without knowledge of this shipment of potatoes until it was informed that the load had arrived in Atlanta, Georgia, from the Wayne Breisch farm in Pennsylvania. This load was picked up accidentally by a hired trucker and trucked to Atlanta, Georgia, with no invoice, manifest, bill of lading, or other document that customarily accompanies a shipment of this kind.

In the shipments to *Berry's Wholesale Fruits & Produce*, Washington, D. C., and to *Morris Cohen*,

Cleveland, Ohio, the Secretary of Agriculture, in his Decision and Order (J.A. 263), found as follows:

> Willfulness was found by the hearing examiner in connection with the Berry and Cohen shipments on the basis of the prior warnings and correspondence between complainant and respondent Harrisburg, relying primarily on *Air Transport Associates, Inc.*, v. *Civil Aeronautics Board*, supra, at p. 186. See also *Hughes* v. *Securities and Exchange Commission*, 174 F.2d 969, 976-77 (D.C. Cir. 1949). However, Harrisburg's replies to complainant's letters and telegrams were not confirmation by it that the corporation intended to continue to pursue the prohibited or illegal conduct as in the *Hughes* case. In fact, the replies demonstrated a desire to comply with statutory requirements in in the future. Also, the prior warnings given by complainant to respondent Harrisburg do not constitute evidence that later *isolated* shipments of misbranded potatoes were willful. The continued illegal conduct after administrative warnings in the *Air Transport* and *Hughes* cases was tantamount to an established method of doing business. That Harrisburg did not comply with statutory requirements in the Berry and Cohen shipments is not sufficient, by itself, to establish that those shipments were willful. It is concluded that complainant has failed to sustain the burden of proof in this regard and that, consequently, these two violations of Section 2(5) of the act, i.e., the Berry and Cohen shipments, will not be considered in determining the sanction to be imposed herein against respondent Harrisburg.

The remaining five (5) transactions concerned herein, the *Kaler, Singer, Baker, Overton,* and *Heaton & Barry* shipments, in which no finding of willfulness was made by the Secretary of Agriculture in his Decision and Order (J.A. 262), must be considered in light of

the remaining portion of the provisions of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b).

The *Kaler* shipment, which consisted of one of several loads of potatoes purchased by Harrisburg Daily Market, Inc., from the Pennsylvania Growers Cooperative Association, a licensed handler of perishable agricultural commodities, was stopped by Petitioner at Jacksonville, Florida, where a qualified potato broker examined the potatoes and informed Harrisburg Daily Market, Inc., that they were properly graded. Petitioner took this action for the reason that the remaining loads of potatoes, still in its possession, were breaking down as to grade. Upon receipt of the favorable report from the broker in Jacksonville, Harrisburg Daily Market, Inc., continued the shipment to it destination point in Miami, where Petitioner ordered and paid for a federal inspection of the potatoes. This inspection showed that the potatoes were out of grade, whereupon Pennsylvania Growers Cooperative Association informed Harrisburg Daily Market, Inc., that the load had been refused at the destination point, and instructed Petitioner to handle it to its best advantage. The grade markings on the sacks were obliterated before further disposition of the potatotes. The Association suffered the loss and Harrisburg Daily Market, Inc., received the normal brokerage fee for its part in the transaction. The U. S. Department of Agriculture, after its investigation of the *Kaler* shipment, took no additional action at the time, except to mark its record that the misbranding had been corrected. (J.A. 28).

The *Singer* shipments consisted of potatoes packed and graded at Harrisburg's own plant. When the

load arrived at its destination in Cleveland, Ohio, Harrisburg Daily Market, Inc., was informed by its customers that the potatoes were out of grade, whereupon Petitioner immediately ordered government inspection of the load, which disclosed such a fact. (J.A. 30).

When notified of the misbranding by the U. S. Department of Agriculture, Harrisburg Daily Market, Inc., assured the Department that stricter attention would be given to future grading and packing. The Department marked its file to show that the misbranding had been corrected and took no further action. (J.A. 37).

The *Baker* shipment was packed at Trio Farms, Bethlehem, Pennsylvania, loaded on a hired truck, and shipped direct to Baker Produce Co., Forrest Park, Georgia. Trio Farms made an adjustment with Harrisburg Daily Market, Inc., after federal inspection of the load at destination point indicated that the potatoes were out of grade. The applicant for this inspection was Harrisburg Daily Market, Inc. The U. S. Department of Agriculture notified Petitioner by letter of the misbranded shipment, and that the receiver had been directed to correct the misbranding by obliterating the "U.S. No. 1" grading marks. A similar letter also went forward to Trio Farms, and both this supplier and Harrisburg Daily Market, Inc., addressed letters of explanation to the Department. (J.A. 41).

The *Overton* shipment consisted of potatoes brought to Petitioner's plant and reloaded onto a trailer. In the process, Harrisburg Daily Market, Inc., examined a number of bags of these potatoes at random and the

potatoes so examined were determined to be properly graded. (J.A. 130). However, federal inspection at the destination point revealed the presence of grade defects averaging approximately 15 percent, chiefly scab, (J.A. 131), which is easily discernible. No scab appeared in any of the potatoes examined by Harrisburg Daily Market, Inc., at the shipping point.

Harrisburg Daily Market, Inc., was notified in writing by the U. S. Department of Agriculture of the misbranding. Petitioner replied that it would not ship any more potatoes from Pennsylvania for the season without federal shipping point inspection. The Department advised Harrisburg Daily Market, Inc., that it would take no regulatory action at this time with respect to the Overton shipment. (J.A. 49).

The *Heaton & Barry* shipment was sold to Harrisburg Daily Market, Inc., by Trio Farms as U. S. No. 1's. Petitioner was satisfied of this fact, as it observed the potatoes when they were going over the grader in its plant. After federal inspection at destination point, a price adjustment was made by Harrisburg Daily Market, Inc., in favor of *Heaton & Barry*. The U. S. Department of Agriculture sent joint telegrams to both Harrisburg Daily Market, Inc., and Trio Farms, advising them of the misbranding and requesting explanations. Both Petitioner and Trio Farms replied. (J.A. 58-59).

Thus, the question arises, with respect to the aforesaid five (5) transactions, the *Kaler, Singer, Baker, Overton*, and *Heaton & Barry* shipments, as to whether the U. S. Department of Agriculture observed the notice requirements of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), in these transactions in the absence of willfulness.

It is also of significance to emphasize at this point, the fact that of the seven (7) shipments on which the Order of the Secretary of Agriculture was ultimately founded, the potatoes in four (4) of these transactions, the *Baker*, *Overton*, *Goodman*, and *Heaton & Barry* shipments, were supplied by Trio Farms, Bethlehem, Pennsylvania, a licensee under the licensing provisions of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq.

REASONS FOR THE GRANTING OF THE WRIT

One primary reason relied upon for the allowance of this Petition for a writ of Certiorari is that this case raises important questions of federal law concerning the interpretation of Section 2(5) of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., and the interpretation and application of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), which controls the procedure of the U. S. Department of Agriculture in disciplinary actions pursuant to which license suspension is ordered. These questions have not been, but should be settled by this Court. There have been no cases in the federal courts involving Section 2(5) of the Perishable Agricultural Commodities Act, since the amendment of this Section of the Act, in 1956, and the questions here presented for settlement by this Court, will have a far-reaching effect on the members of a vital and important industry, the shipment and handling in interstate and foreign commerce of perishable agricultural commodities.

A second primary reason relied upon for the allowance of this Petition for a Writ of Certiorari is that the decision of the Court of Appeals for the District

of Columbia Circuit, in the action below, affirming the Order of the Secretary of Agriculture, is in direct conflict with the statutory provisions of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), requiring the U. S. Department of Agriculture, in the absence of willfulness, to extend to the licensee shipper herein, the opportunity of demonstrating or achieving compliance with all lawful requirements.

A third primary reason relied upon for the allowance of this Petition for a Writ of Certiorari is that the decision of the Court of Appeals for the District of Columbia Circuit, in the action below affirmed the Order of the Secretary of Agriculture upon findings that the amending of the Perishable Agricultural Commodities Act, 46 Stat. 531 (1930) in 1956, to eliminate the need to show the existence of fraudulent purpose, 70 Stat. 726 (1956), 7 U.S.C. 499b(5) (1958), made it unnecessary to establish willfulness by facts surrounding a particular shipment of perishable agricultural commodities, on the theory that any shipment of misbranded potatoes in interstate commerce is violative of the aforesaid Act. Such a premise is not supported by the legislative history of the Act, nor by judicial authority.

ARGUMENT

The seven (7) shipments of potatoes on which the Secretary of Agriculture based his Order of suspension herein, must be divided into two (2) groups and considered separately, in view of the willfulness exception in Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b).

The U. S. Department of Agriculture failed to adhere to the notice requirements of Section 9(b) of this

Act, in the instance of the *Goodman* and *Heaton & Son* shipments, and the establishment of willfulness was necessary in order to apply the sanction of license suspension. As in the case of the remaining five (5) transactions, the *Kaler, Singer, Baker, Overton*, and *Heaton & Barry* shipments, the potatoes concerned in the *Goodman* and *Heaton & Son* shipments were determined by Federal inspections at the respective wholesale destination points, to be out of grade. How then did the U. S. Department of Agriculture attempt to establish willfulness in the *Goodman* and *Heaton & Son* shipments, when no finding of such element was made in the instance of the *Kaler, Singer, Baker, Overton* and *Heaton & Barry* shipments.

Proceeding on the premise that the seven (7) transactions "are similar", as admitted by the Respondents, judicial authorities are in agreement that the mental element of willfulness denotes that which is intentional, or knowing, or voluntary, as distinguished from accidental. *United States* v. *Illinois Central R. Co.*, 1938, 303 U.S. 239, 242-243. "Willful" does not require evil intent, but it is sufficient if the act was done knowingly and purposely. *Chicago, St. P., etc.* v. *United States*, 162 F. 835, 841, 90 C.C.A. 211. Even the U. S. Department of Agriculture shares this view. During the hearing of this case before the Hearing Examiner, this official stated for the record (J.A. 138) as follows:

> Now if we had just a problem of he who ships is guilty if the potatoes are not of the brand, irrespective of knowledge or anything else, that implies that the guy knew what he was doing, nevertheless went ahead and did it.

In this respect, the Complainant (Deputy Director, Fruit and Vegetable Division, U. S. Department of Agriculture), stated for the record (J.A. 138) as follows:

> Now, under the Administrative Procedures Act, willful means knowingly did it, period, that they did it and the fact they did it knowingly.

In the *Goodman* shipment, Harrisburg Daily Market, Inc., never saw the potatoes in the load that was diverted to Baltimore, Maryland, while in transit from Trio Farms to Harrisburg, Pennsylvania. There is no proof in the record that the potatoes in this load were of the same lot as the first load which reached Harrisburg. When it became apparent to Petitioner that the potatoes in the first load would not grade, it refused to accept the second load, and to accommodate Trio Farms, it caused the load to be diverted to Goodman in Baltimore, with explicit instructions to correct the grade marks. This was done by Goodman in the presence of a federal inspector. Thus, Harrisburg Daily Market, Inc., did not willfully misrepresent the grade of this load for the purpose of influencing Goodman to enter into a contract for the purchase of the potatoes.

The basis for the finding of willfulness by the Secretary of Agriculture in the *Goodman* shipment, was the alleged knowledge on the part of Harrisburg Daily Market, Inc., that the potatoes concerned in this transaction were out of grade prior to shipment in interstate commerce (Respondents' Brief, p. 19). This premise is not supported by the record. On the contrary, Harrisburg Daily Market, Inc., informed Goodman that Petitioner had not seen the potatoes in the shipment.

and that if they were not properly graded, to correct the grading, which was accomplished under the supervision of a federal inspector. Thus, the argument by the Secertary of Agriculture that these facts establish a willful or intentional shipment of a misbranded commodity, was without merit.

In the *Heaton & Son* shipment, a load of potatoes entered the stream of commerce without the knowledge or sanction of Harrisburg Daily Market, Inc., a single instance of its kind in some 3,200 transactions, which the U. S. Department of Agriculture characterized as an employment of "such loose procedures in connection with this transaction as to indicate a careless disregard on its part for statutory requirements." (J.A. 263). As soon as Harrisburg Daily Market, Inc., learned of this shipment, it immediately caused the shipment to be properly identified and graded. Thus, the elements of willfulness, intent or knowledge, cannot be imputed in this transaction, and Harrisburg Daily Market, Inc., took every action possible, when it learned of this shipment, to bring it into compliance with all lawful requirements.

As heretofore indicated, the *Berry* and *Cohen* shipments were not considered by the Secretary of Agriculture in determining the sanction of license suspension imposed against Harrisburg Daily Market, Inc., (J.A. 263), on the premise advanced by the Hearing Examiner that "willfulness" was indicated in the *Berry* and *Cohen* shipments on the basis of the prior warnings and correspondence between the U. S. Department of Agriculture and Harrisburg Daily Market, Inc.

Thus, the Secretary of Agriculture conceded that even a non-compliance with "statutory requirements

. . . is not sufficient, by itself, to establish . . . " willfulness, and since the several shipments involved in this case, as observed by the Secretary of Agriculture (Respondents' Brief, p. 28), are similar, it follows that the *Goodman* and *Heaton & Son* shipments were not properly used by the Secretary of Agriculture in supporting his Order. This observation is in direct conflict with the Secretary's statement (Respondents' Brief, p. 24), wherein he stated that it is a violation of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., to misrepresent by the means enumerated, irrespective of any willfulness or intent.

The Congress amended the Act at the instigation of the U. S. Department of Agriculture after the agency had experienced difficulty in attempting to prove misrepresentation "for a fraudulent purpose" under Section 2(5) of the Act. Following this, the House Committee reported that—

> The bill would—without broadening the scope or original intent of the Perishable Agricultural Commodities Act of 1930, as amended, correct certain deficiencies . . .

Further—

> . . . evidence of *bona fide misrepresentations* relative to grade, quality, etc., would represent an adequate base for the declaration of illegal conduct. (Emphasis supplied).

The Hearing Examiner of the U.S. Department of Agriculture, in his report (J.A. 209) stated in part—

> The complaint alleges that the misbrandings by Harrisburg Market constituted willful, repeated, and or flagrant violations of section 2(5) of the

act, but this section does not make willfulness, intent or even knowledge an element of the offense of misrepresentation. Congress eliminated such elements when it enacted Public Law 842, 84th Congress, approved July 30, 1956, which amended section 2(5) to eliminate the phrase 'for a fraudulent purpose.'

These subjective mental elements were not spelled out in Section 2(5) of the Act, prior to its amendment in 1956, although the Hearing Examiner obviously was of the opinion that such elements were present prior to the enactment of Public Law 842, and that they were eliminated by deleting the phrase "for a fraudulent purpose," from the Act. Thus, "willful, repeated and or flagrant" were regarded by Hearing Examiner as synonymous with "fraudulent". In his report, Hearing Examiner concluded that none of the misrepresentations at issue was made for a fraudulent purpose. It must follow, therefore, that they were, likewise, not willful. In amending the Act in 1956, The Congress had no intention of "broadening the scope or original intent" of the Act, but only to "correct certain deficiencies".

The key phrase "to misrepresent" was not changed in amending the Act. To misrepresent is to *intentionally* (emphasis supplied) issue a false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract, and influential in producing it. *Black's Law Dictionary, II Edition.*

The Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., is a remedial statute, and should not be considered in the same light with criminal statutes wherein guilt is estab-

lished by the commission of a criminal act, regardless of intent.

Thus, no element of willfulness, as that term is defined in the statutory sense, was present in either the *Goodman* or the *Heaton & Son* shipments, an element necessary since the U. S. Department of Agriculture failed to adhere to the notice requirements of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), and the Secretary of Agriculture erred in using these two transactions as a basis for applying the sanction of license suspension against Harrisburg Daily Market, Inc.

Since the Secretary of Agriculture made no finding of willfulness in the instance of the remaining group of shipments concerned herein, the *Kaler*, *Singer*, *Baker*, *Overton* and *Heaton and Barry* shipments, the Secretary of Agriculture was required under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b) to call to the attention of the licensee in writing, those facts and conduct which appeared to warrant license suspension, and to accord the licensee the opportunity to demonstrate or achieve compliance with all lawful requirements.

The notices to Harrisburg Daily Market, Inc., in respect to the aforesaid five (5) shipments, took the form of letters and telegrams informing Harrisburg Daily Market, Inc., of the nature of the misbrandings in the five shipments; that they were in violation of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq.; and requesting explanations and information as to the action that Harrisburg Daily Market, Inc., would take to prevent a recurrence of the violations.

It is the argument of the U. S. Department of Agriculture that Harrisburg Daily Market, Inc., could not achieve compliance since the misbrandings had already taken place and could not be undone; further, that Harrisburg Daily Market, Inc., could only demonstrate compliance by showing that Section 2(5) of the Act had not been violated in that the misbrandings had not occurred or that Harrisburg Daily Market, Inc., was not responsible for them. (J.A. 226, 262).

It is Petitioner's contention that the opportunity to demonstrate or achieve compliance is an integral part of the notice requirement under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), and that if the licensee is unable to demonstrate compliance by showing that no violation had occurred or that such licensee was not responsible for the misbranding, such licensee, pursuant to the language "demonstrate *or* achieve" (Emphasis supplied), is entitled to the opportunity of achieving compliance with all lawful requirements by taking such corrective action as is available, to include rectifying the grade marks, making price adjustments, and adopting procedures and practices which will prevent recurrence.

Warren, Federal Administrative Procedure Act & Administrative Agencies, p. 464, observed that "the withdrawal of existing licenses shall not be made except after opportunity for corrective action has been granted to the licensee." *Ashley Sellers*, former Assistant War Food Administrator, is quoted in this authority (p. 542): "Achieve means the future, though. You have to give them an opportunity to be good."

In its oral argument before the Under Secretary of Agriculture, the U. S. Department of Agriculture stated (J.A. 238):

> . . . When we send out these letters, we are encouraging them to take whatever steps are necessary to prevent such conduct. If they tell us they are doing that and are demonstrating that they are, by the fact that we don't have any more misbrandings from them, then we will consider that they have demonstrated compliance. They are demonstrating compliance by an effort to prevent the recurrence, and we will not take action.

In *Shuck* v. *Securities and Exchange Commission*, 264 F. 2d 358, the court stated that the opportunity to demonstrate or achieve compliance should be accorded on some fair and reasonable basis. In that case, the court concluded that Shuck could neither demonstrate nor achieve compliance because the record clearly indicated, if not willfulness, at the very least Shuck's unwillingness or inability to maintain required standards for a long period of time in the past and a finding by the District Court that he would not maintain those standards in the future.

Complainant's (Deputy Director, Fruit and Vegetable Division, U. S. Department of Agriculture) Brief, Proposed Findings of Fact and Conclusion, alleged that the Regulatory Branch of the agency "felt that respondent was failing to demonstrate and achieve compliance in that it had failed to take steps to prevent recurrence of the misbranding . . ." (J.A. 240). The converse of this statement is in agreement with the argument of Harrisburg Daily Market, Inc., that compliance with all lawful requirements can be demonstrated or achieved even though a misbranding has occurred.

The Legislative history of the amending of the Perishable Agricultural Commodities Act in 1956, is

in support of Petitioner's argument. In the hearing before the Subcommittee on Domestic Marketing of the Committee on Agriculture, House of Representatives, 84th Congress, First Session, on H.R. 5818, May 26, 1955, Congressman Harlan Hagen, proposed a hypothetical situation to Mr. C. R. Grange, Deputy Director of the Fruit and Vegetable Division, Agricultural Marketing Service, U. S. Department of Agriculture, as to the guilt of a middleman in Ohio, who, without knowledge of the fact, purchased misbranded potatoes from a source in California, and relying on the label or his contract, resold on that basis. Mr. Grange, in replying, stated in part (J.A. 240):

> . . . if that comes to our attention we will inform that buyer that they are not 'No. 1' potatoes, and that for him to go ahead knowing that, to sell them in those original containers, without either obliterating the mark of having them regraded to bring them into compliance with the grade on the bag, why then we would hold him in violation of the PAC act. Unless he takes such independent action on his part, we will not hold him accountable for the original misbranding, but we will hold him to see that the misbranding is in some manner or otherwise corrected. *We would not go ahead and prosecute him for having done the misbranding, but if we pointed out to him and he does nothing about it, why then look to him for some redress.* (Emphasis supplied).

Mr Charles W. Buey, Assistant General Counsel, U. S. Department of Agriculture, also testifying at the hearing, added in part:

> . . . I think it would be of interest in that connection, under the Administrative Procedures Act, in the case of a licensee, it requires that in the absence

> of willfulness you must notify the party and give him an opportunity to bring himself into compliance.

As heretofore set forth, Trio Farms, a licensee, supplied the potatoes in five of the nine shipments, namely, the *Baker*, *Overton*, *Goodman*, *Heaton & Barry*, and *Cohen* shipments. The potatoes, while under the control of Trio Farms, had defects in excess of allowable tolerances, and consequently, were out of grade at the point of origin. Both Harrisburg Daily Market, Inc., and Trio Farms received joint notices from the U. S. Department of Agriculture. In its oral argument before the Under Secretary of Agriculture, the U. S. Department of Agriculture argued in part (J.A. 237):

> . . . we asked them for an explanation. In each of the cases they returned an explanation . . . We have accepted that, just as we have accepted Harrisburg's explanations. The difference between Trio and Harrisburg is that Harrisburg kept going . . . As to Trio Farms, we got cooperation from them, showing an effort on their part to correct the practices which caused the misbranding. That, to us, is sufficient, and we did not take any action against them.

To determine whether Harrisburg Daily Market, Inc., "kept going" and Trio Farms stopped, an examination of the sequence of the shipments (J.A. 241) discloses that the last notice was sent by the U. S. Department of Agriculture in connection with the *Heaton & Barry* shipment of January 17, 1960, and that thereafter, the *Heaton & Son* shipment occurred on February 8, 1960, and the *Cohen* shipment, five days later, on February 13, 1960. Thus, if Petitioner "kept going" on the basis of one more shipment, so did Trio

Farms, because this licensee supplied the potatoes in the *Cohen* shipment. Yet, the U. S. Department of Agriculture argues that disciplinary action was instituted against Petitioner and not Trio Farms because Harrisburg Daily Market, Inc., was the only licensee of the two that "kept going".

Also, it is obvious that in this situation, the U. S. Department of Agriculture did not press its contention that once the misbranding has occurred, it is not possible for any licensed handler in the chain of shipment to "demonstrate or achieve compliance" since it permitted Trio Farms to comply "with all lawful requirements."

Thus, the Secretary of Agriculture, in a capricious and arbitrary manner, applied the sanction of license suspension, under the pertinent provisions of Section 2(5) of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), against Harrisburg Daily Market, Inc., but not Trio Farms, a participating licensee in four (4) of the seven (7) shipments here concerned.

Although the Secretary of Agriculture, (Respondents' Brief, p. 25) argues that "the misconduct of others cannot be relied on to justify the violations by Harrisburg Market", the Secretary of Agriculture has been delegated by The Congress the authority and the responsibility to enforce the provisions of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a et seq., and his failure to proceed against Trio Farms on the premise (J.A. 237) "that we got cooperation from them showing an effort on their part to correct the practices which caused the

misbranding", cannot be reconciled with the premise of the Secretary of Agriculture, as set forth in his Decision and Order (J.A. 256) "that the act of misrepresenting by the means specified therein (the Act) in connection with the subject matter there described constitutes a violation of such section (Section 2(5)) irrespective of the intent of the licensee to misrepresent or even knowledge that a representation is untrue.

The Petitioner herein can only conclude that the condonation of the acts by Trio Farms in those shipments participated in by this shipper is tantamount to according to Trio Farms the opportunity of demonstrating or achieving compliance with all lawful requirements, as provided in Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b). This, despite the fact that in the case of the Petitioner herein, Harrisburg Daily Market, Inc., the Secretary of Agriculture concluded that Petitioner could neither demonstrate nor achieve compliance with all lawful requirements since the alleged violations had already occurred. (J.A. 262).

The record reflects that federal inspections of potatoes are not mandatory; that Harrisburg Daily Market, Inc., in the instance of each shipment herein, acted with diligence and dispatch, in ordering and paying for federal inspection of the potatoes concerned, while the lots were still at the wholesale level, and corrected or caused to be corrected, the grade markings on each lot in question. Thus, the interests of the consumer, for whose protection the Perishable Agricultural Commodities Act was primarily enacted, was safeguarded in each instance.

CONCLUSION

For the reasons stated, and under the authorities cited, it is submitted that the decision of the Court of Appeals for the District of Columbia Circuit was and is in error, and that this Petition for a Writ of Certiorari to that Court to review its action in so holding, as herein sought, is well founded in fact and in law and should be granted.

Respectfully submitted,

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